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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 878 57

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ACME INDUSTRIAL COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR ACME INDUSTRIAL COMPANY IN OPPOSITION.

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OPINIONS BELOW.

The Board's decision and order (J.A. 26-33)[1] is reported at 150 NLRB No. 144. The Opinion of the Court of Appeals for the Seventh Circuit is reported at 351 F. 2d 258. No petition for rehearing was filed in the Court of Appeals.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

1. As in the Board's Petition, "J.A." refers to the Joint Appendix in the court below, copies of which were filed with the Petition.

QUESTIONS PRESENTED.

1. Whether it is a refusal to bargain collectively, in violation of Section 8(a)(5) of the National Labor Relations Act, for an employer to decline to furnish a union with information which is not presumptively relevant to wages, hours or other terms and conditions of employment and for which no proof of relevance has been shown.

2. Whether information which may be *related* to a collective bargaining agreement must, *ipso facto,* under the provisions of Section 8(a)(5), be given to the union requesting same.

STATUTE INVOLVED.

The Board's Petition for Certiorari omits the following significant portion of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. § 151, *et seq.*; Sec. 173 (d)):

> "(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

STATEMENT.

The Board's statement of facts alleges that: "After a full evidentiary hearing, the Board found that the information sought by the Union was necessary . . ." (p. 5, Petition). To the contrary, however, the record shows that Respondent's attempts to elicit testimony concerning the irrelevancy of the requested information were hampered by continued objections from Counsel for the General Counsel (see J.A. 50-51), which objections the Trial Examiner finally upheld (J.A. 82-83):

"Trial Examiner: I would now rule that it is not an issue.

"Mr. Kovar: May I be heard before you rule, Mr. Trial Examiner?

"Trial Examiner: Yes, sir.

"Mr. Kovar: Under Article 6, Section 10 of the collective bargaining agreement, the parties have negotiated a provision which requires that where equipment is moved to another location of the company an employee who is then working in the plant who is subject to reduction in classification or is subject to layoff as a result thereof has certain rights.

"Trial Examiner: Yes, that is right.

"Mr. Kovar: If the union knows that there are no such employees as we have attempted to indicate is the fact through the testimony we have sought to introduce here, then it seems to me clear on the face that the additional information as to where equipment is moving is completely irrelevant to this contract, to the administration, to its enforcement.

"Now, unless I can get into the record clear testimony the fact that the union knows very well that no employee has been laid off as a result of removal of equipment and knows very well that no employee has been reduced in classification as a result of this, I have an open question at which point the General Counsel may argue, 'Well, we don't know whether anyone has been laid off or not, and therefore, it might be, this information might be relevant so why not give it.'

"So facing that kind of argument, this is relevant.

"Trial Examiner: I will accept that kind of argument to the pleadings in this case. So I still consider this question irrelevant as to what is contained within the issues here which I construe is much more narrow than apparently the parties.

"This is a very narrow complaint. In effect you are anticipating allegations which have not been made. In other words, asserting an affirmative defense where there is no attack, where no attack has been placed by the General Counsel. I don't think that is necessary. The General Counsel has not made the direct allegation

and submitted evidence in support thereof and there is no necessity for you to rebut it.

• • • • •

"Mr. Kovar: Mr. Trial Examiner, at this time I will renew the motion which was entered by stipulation at the opening of the hearing and in oral fashion refer that motion and the reasons thereto set forth: I do not believe that the complaint or the evidence supporting it alleges, much less shows a violation of the National Labor Relations Act.

• • • • •

"[Trial Examiner.] . . . If I reach a decision and say that the Board should accept jurisdiction, then I will reach and only then the question of the relevancy of the information requested. Therefore, I am reserving decision on your motion, naturally."

The Board's statement does not note the fact that the Trial Examiner recommended that the complaint be dismissed in its entirety, stating (J.A. 24-25):

"I would not hold that the Respondent has committed an unfair labor practice by withholding information where the dispute has been contemplated by the parties in making their contract and binding arbitration has been established to resolve that dispute. We are approaching a point where an employer may well wonder if he has anything to gain by engaging in collective bargaining if any disaffection with the operation of the contract on the part of the contracting union may be taken to review by the Board under Section 8(a)(5)."

ARGUMENT.

The Petition presents no question warranting further review.

1. There is no conflict between the decisions of the courts below. No court has held, as the Board here contends, that an employer must give information which is neither presumptively, nor proven, relevant to the union's bargaining and representative function.

The *Timken Roller Bearing* case (325 F. 2d 746 (6th Cir. 1963), *cert. denied,* 376 U.S. 971 (1964)), involved wage data, which was held to be presumptively relevant to the bargaining function of the union. Its relevance stood clear without regard to the existence or special language of the labor agreement.

The *Curtiss-Wright* case (347 F. 2d 61 (3rd Cir. 1965)) also involved presumptively relevant information. The relevance of the information did not depend upon the provisions of a labor agreement.

In the only courts of appeals cases prior to the one here involved, where the Board has attempted to initiate itself into the administration and enforcement procedures of a labor agreement, the courts have uniformly denied the Board's attempts. *Sinclair Refining Co.* v. *NLRB,* 306 F. 2d 569 (5th Cir. 1962); *Square D Company* v. *NLRB,* 332 F. 2d 360 (9th Cir. 1964). In both cases the courts emphatically rejected the Board's attempted entry into labor contract administration. In both cases, the courts held that where the relevance of the requested information depended upon the language of the labor agreement, a contract issue was involved, not a statutory issue; contractual remedies should be pursued, not statutory remedies.

The Board, in a footnote in its Petition (p. 8, Petition), takes the position that this case does not involve labor agreement interpretation. But this position ignores the clear and unambiguous holding of the lower court (pp. 17-18, Petition):

> ". . . Where the determination of the relevancy of information necessarily involves factors interrelated with or dependent upon construction of the substantive provisions of the labor agreement, and those provisions are the bases of pending grievances already submitted under the grievance and arbitration procedures of the agreement, Board intervention in the guise of determining and enforcing the peripheral matter of the duty to furnish information requested contributes nothing to any objective of the Act and in our opinion is improper. The order clashes with the policy of effectual achievement of contractual arbitration.
>
> "The Board's order is set aside and its enforcement is denied."

We must assume that what the Board is contending is that contract interpretation affects the relevance of information sought only when it relates to the arbitrability of the alleged grievance. But this contention would destroy the significance of the requirement of relevance, because as this Court has held (*United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 581 (1960)):

> "Apart from matters that the parties specifically exclude, all of the questions on which the parties disagree must therefore come within the scope of the grievance and arbitration provisions . . ."

If any colorable claim is arbitrable, (even ". . . frivolous claims may have therapeutic value . . ." (*United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568 (1960)) then, under the Board's contention, any information related to any colorable claim must be given upon request.

No court of appeals has ever so held.

2. While the importance of the questions here involved cannot be gainsaid, we respectfully submit that their repetition below is due to the Board's failure to follow the clear mandate expressed by this Court in *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 153-154 (1956):

> "[. . .] The inquiry must always be whether or not under the circumstances of the particular case the statutory objective to bargain in good faith has been met."

The Board, we believe, is attempting to establish another *per se* rule of bargaining in good faith. And in doing so, the Board has not only ignored the clear mandate of this Court, but has also ignored the uniform lower court rejection of its attempt to establish a rule that any information which may be related to a labor contract provision must be submitted upon union request.

3. The Board attempts to invoke this Court's consideration by challenging, in its Petition (pp. 9-11, Petition), the propriety of the lower court's decision. Thus, the Board contends that the deprivation of information concerning removed equipment hindered the union in the performance of its duties (p. 10, Petition).

How? How is a union hindered by not knowing about the removal of equipment which has never been used? Unused for years? Damaged beyond repair? Obsolete? Replaced by new equipment? Saying it does not make it so, but that is *all* the Board has done.

The Board further argues that the decision below is incompatible with an effective grievance procedure (pp. 10-11, Petition). The fact that this case involves matters occurring some two years ago should rather conclusively reveal that the Board's intervention in a grievance case is something less than efficacious. In *Sinclair Refining Co.* v. *NLRB*, 306 F. 2d 569, 579 (5th Cir. 1962), the court decisively impaled this argument upon its own point, stating:

"But if the Union may, as it has done here, call upon an outside agency as the weapon for discovery of information which, on one of the alternative constructions of the contract, will be completely superfluous, the whole proceeding is necessarily disrupted. The arbiters cannot continue. The whole controversy then shifts from the plant to the nearest Board hearing room, and thereafter to the nation's capital, and then on to the seat of any one of the eleven Courts of Appeals having geographical jurisdiction over the employer. Whatever else that is, it is not giving full play to the means established by the parties. More than lost time, it introduces or magnifies advocative hostility. For now a new adversary has entered the lists—the General Counsel who, from the nature of the complaint, aligns himself with one of the adversaries—the Union—but who as a sort of protector of the general public interest must advance his advocacy, pro and con, not in the manner best calculated to bring an end to the dispute, but in a manner thought, from that lofty vantage, to be best for the general good. Even worse, that diversion ends in a decision which, if it determines the substantive issue adversely to the Employer as does this one leaves the Employer facing an additional adversary —the Board. This makes it necessary for the Employer to resist that determination in order to get the matter back where it started—in the laps of the arbitrators. To do that the Employer must come to court. But the courthouse, says the Supreme Court, is not the place to work out industrial disputes when arbitration has been prescribed and is available."

With all due respect, we submit that it was the decision of the Labor Board that was in error, not that of the Court of Appeals for the Seventh Circuit.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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